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10/676,397	10/01/2003	Frank Rehders	9047MQ	7544
27752 7590 11/12/2008 THE PROCTER & GAMBLE COMPANY Global Legal Department - IP Sycamore Building - 4th Floor 299 East Sixth Street CINCINNATI, OH 45202				
EXAMINER				
FORTUNA, JOSE A				
ART UNIT		PAPER NUMBER		
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* FRANK REHDEES  
and JEFFREY GLEN SHEEHAN

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Appeal 2008-4491  
Application 10/676,397  
Technology Center 1700

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Decided: November 12, 2008

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Before EDWARD C. KIMLIN, CATHERINE Q. TIMM, and,  
JEFFREY T. SMITH, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-6 and 17-18. Claims 9-16 have been withdrawn from consideration by the Examiner. Claim 1 is illustrative:

1. A tissue paper product made from a papermaking furnish comprising one or more plies of a tissue paper; wherein at least one of the

plies comprises cellulose and from about 0.005% to no more than 0.1% by weight, based on the weight of cellulose, of xylan added to the furnish.

The Examiner relies upon the following reference as evidence of obviousness:

Reinheimer et al. (Reinheimer)      US 5,810,972      Sep. 22, 1998

Appellants' claimed invention is directed to a tissue paper product wherein at least one of the plies of the product comprises xylan in an amount from about 0.005% to no more than 0.1% by weight. According to Appellants, the claimed relatively low levels of xylan provide increased strength in paper products.

Appealed claims 1-6 and 17-18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reinheimer.

Appellants have not separately argued any particular claim on appeal. Accordingly, all the appealed claims stand or fall together with claim 1.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we are in full agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection for essentially those reasons expressed in the Answer, and we add the following primarily for emphasis.

Appellants do not dispute the Examiner's factual determination that Reinheimer, like Appellants, discloses a tissue paper product made from a papermaking furnish comprising one or more plies of a tissue paper wherein at least one of the plies comprises cellulose and xylan. The sole distinction

over the prior art argued by Appellants is that the minimum amount of xylan disclosed by the reference is 0.25%, which amount is greater than the maximum amount claimed of 0.1%. Appellants maintain that Reinheimer provides no teaching, suggestion or motivation to use the lesser amount of xylan claimed.

We are not persuaded by Appellants' argument. It is by now well settled that where patentability is predicated upon a change in a condition of a prior art composition, such as a change in concentration or the like, the burden is on the applicant to establish with objective evidence that the change is critical, i.e., it leads to a new, unexpected result. *In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Aller*, 220 F.2d 454, 456 (CCPA 1955). In the present case, Appellants have advanced no objective evidence which establishes that using a lesser amount of xylan than that disclosed by Reinheimer produces an unexpected result. Indeed, Appellants acknowledge in their Specification that the **most preferred** amount of xylan is within the range of 4-6 % by weight which amount is considerably greater than the claimed amount (Specification 6:27-29). While Appellants are certainly free to claim a non-preferred amount of xylan, this undermines any assertion of criticality for the claimed amount. Moreover, we agree with the Examiner that Appellants have not established that there is any significant distinction between paper plies having xylan present in amounts of 0.1% and 0.25% by weight. As a result, Appellants have not rebutted the prima facie case of obviousness established by the Examiner.

In conclusion, based on the foregoing, the Examiner's decision rejecting the appealed claims is affirmed.

Appeal 2008-4491  
Application 10/676,397

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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